ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re the Matter of	)	
	)	
Amendment of Parts 21 and 74 Of The Commission's Rules With Regard To Filing Procedures In The Multipoint Distribution Services And In The Instructional Fixed Television Service	)	MM Docket No. 94-131
	)	
and	)	
	)	
Implementation of Section 309(j) of the Communications Act And Competitive Bidding	)	PP Docket No. 93-253

To: The Commission

RESPONSE TO PETITIONS FOR RECONSIDERATION

OMNI MICROWAVE ASSOCIATES ("Omni") pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.492(f), hereby responds to certain of the petitions for reconsideration filed by various parties in response to the Commission's Report and Order, 10 FCC Rcd ____ (FCC 95-230, released June 30, 1995), 60 Fed. Reg. 36524 (Jul. 17, 1995).[1/]

Omni Is A Party In Interest

1. Omni has sufficient interest and would suffer a concrete injury from the adoption of the Rules as adopted in the Report and Order, specifically those providing for a "right of first refusal" to future BTA authorization holders for use of excess capacity on ITFS frequencies.

2. Omni is the "E" Group licensee in the Charlotte, North Carolina MSA. Omni and its management team have attempted to secure channel leases from ITFS authorization holders within the service area in order to begin programming and operation of a wireless cable facility. There is currently no "F" Group licensee, which has substantially hindered the establishment of a significant wireless cable facility in the MSA. Moreover, the availability of the "F" channel

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[1/] Omni's response is timely filed. *See*, 47 C.F.R. § 1.429(f) (response to petitions for reconsideration filed 15 days after public notice of petitioner's filing). The Commission made the notice in Public Notice, Report No. 2094, released August 24, 1995.

group will, no doubt, result in the issuance of an authorization on a BTA basis. Omni would suffer a substantial injury if a BTA licensees were able to "trump" any channel lease arrangements, all the more so because, as certain parties have identified, the Commission's "right of first refusal" rules have been adopted in violation of the Administrative Procedure Act, 5 U.S.C. § 553(b)(3).

Trans Video And Other Petitioners Have Correctly Noted The Defect In The Commission's *Report and Order*

3. In its "Petition for Partial Reconsideration and Clarification," Trans Video Communications, Inc. ("TVC") has properly challenged the defect in the Commission's notice of the now adopted rule for "rights of first refusal." *See* TVC Petition, pp. 2-3.[2/] As TVC has noted, "[I]t is a basic requirement of administrative rulemaking that substantive changes in agency policies and rules may be adopted only after sufficient public notice which allows comment on the specific proposed rule." *Id.*

4. The D.C. Circuit has only recently chided the Commission on this failure of notice and invalidated a substantive rule adopted without proper notice. *MCI Telecommunications Corp. v. F.C.C.*, 57 F.3d 1136 (D.C. Cir. 1995). There, the Court recited the fundamental APA requirement that the Commission must "provide notice of a proposed rulemaking adequate time to afford interested parties a reasonable opportunity to participate in the rulemaking process." *MCI, supra*, 57 F.3d at 1140, *citing Florida Power & Light Co. v. U.S.*, 846 F.2d 765, 771 (D.C. Cir. 1988).[3/]

5. In *MCI*, the Commission placed a notice in a "background" section of a Notice

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[2/] Pacific Telesis & Cross Country Wireless, Network for Instructional TV, and National ITFS Association support the right of first refusal in their Petitions for Reconsideration.

[3/] As the Court noted, this requirement serves both (1) "to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies;" and (2) to assure that the "agency will have before it the facts and information relevant to a particular administrative problem." *Id., citing National Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982).

of Proposed Rulemaking, which the Court found inadequate. In *McElroy Electronics Corp. v. F.C.C.*, 990 F.2d 1351 (D.C. Cir. 1993), the Court rejected a "notice" argument based upon a footnote. If those instances were inadequate, certainly *no* notice whatsoever of a substantive rule cannot pass judicial review.

The Commission Should Not Interfere With Issues Of State Contract Law

6. TVC has correctly called the "right of first refusal" rules an "impairment of the contract process." (TVC Petition, p. 3). However, it is more -- it is a venture into determination of legal rights and responsibilities that exceeds the Commission's mandate.

7. The Commission has historically taken a "hands off" approach to contract law in matters involving the mass media services such as broadcasting and wireless cable. *See, Transcontinent Television Corp.*, 21 RR 2d 945 (1961). As the Commission noted, it has "neither the authority nor the machinery to adjudicate alleged claims arising out of private contractual agreements between parties." *Id.*, at 961. *See also Richard P. Bott, II*, 4 FCC Rcd 4924, 4929 (¶ 29) (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 2508 (1990) (Commission will not concern itself with different state property laws in context of licensing).

8. However, this is precisely the problem that the Commission is creating for itself in adopting the rule. The Commission will become a forum for resolution of conflicting claims of rights to channel leases, something it has consistently recognized as being beyond its purview. *Transcontinent, supra.*

Conclusion

9. The parties such as TVC which have sought reconsideration of the "right of first refusal" rules are correct. The Commission should reconsider those rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Shannon M. McMahon, paralegal at the law firm of Besozzi, Gavin, Craven & Schmitz, do hereby certify that true copies of the foregoing **"RESPONSE TO PETITIONS FOR RECONSIDERATION"** were sent on this 8th day of September, 1995, by first-class United States mail, postage prepaid to the following:

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